

DOCKET SECTION

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D. C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997 :

Docket No. R97-1

ANSWER OF ADVO, INC. IN OPPOSITION TO MOTIONS OF NEWSPAPER
ASSOCIATION OF AMERICA AND NDMS TO STRIKE CERTAIN
TESTIMONY AND LIBRARY REFERENCES, AND TO MOTION OF
ALLIANCE OF NONPROFIT MAILERS TO STAY PROCEEDINGS

Advo, Inc. (Advo) hereby answers in opposition to (1) the motion of Newspaper Association of America (NAA) opposing the admission into evidence of library references LR-H-109 and 182 and the supplemental testimony of witness Michael McGrane sponsoring those library references, and (2) the motion of Nashua Photo, et al. (NDMS) to strike, among other things, library references LR-H-106 and 108 and the related supplemental testimony of witnesses Marc Smith and Charles Crum. Advo also answers in opposition to the motion of Alliance of Nonprofit Mailers to stay the proceedings "until the USPS files an amended request."

OVERVIEW

Relation of Library References to the USPS's Case. In their motions, NAA and NDMS claim that the Postal Service's case is a "moving target," suggesting that the Postal Service's offer to produce sponsoring witnesses for these library references is tantamount to the filing of a "new case" and that their due process rights would thereby be violated. See, e.g., NDMS Motion at 9, 10; NAA Motion at 2, 4. To put these claims in perspective, it is useful to recall the origin and connection of these library references in relation to the Postal Service's July 10, 1997 request for a recommended decision.

From the first day of this proceeding, July 10, 1997, the parties were not only made aware of these library references but were put on notice of their connection with, and support of, the written testimony of USPS witnesses Crum, Daniel and

Moeller. The library references were identified in the Postal Service's Notice of Filing of Library References, also filed on July 10, 1997, which stated that they "are filed in conjunction with the request for postal rate and fee changes filed today." And, each library reference was specifically cited and identified in the written testimonies of witnesses Crum, Daniel and Moeller as providing support for particular aspects of their testimony.¹

The parties urging that these library references (which are now being offered with sponsoring witnesses) be kept out of the record cannot claim that they are irrelevant or immaterial to the issues in this case. Nor can they legitimately claim surprise. They have known from the outset the significance and relationship of these library references to the Postal Service's case -- specifically, that these documents provide support for aspects of the Postal Service's case that they oppose. The movants have engaged in substantial discovery concerning the library references, and the Postal Service has provided responses that will now be subject to cross-examination of sponsoring witnesses. This is not a situation where the parties have been surprised to discover at a late date some previously-unidentified data or analyses supporting the Postal Service's case.

Complexity of the Proceeding. Alliance of Nonprofit Mailers (ANM) in its motion to stay the proceedings dwells on the complexity of this R97-1 rate filing and the myriad of library references accompanying it, and claims that this increased complexity makes it all the more critical that the Postal Service specifically identify at the outset of the case *all* of the underlying evidence and sponsoring witnesses supporting its case. This claim, too, needs to be placed in perspective.

¹ See Direct Testimony of Joseph D. Moeller, USPS-T-36, at 16, fn. 31, and at 25-26, citing and discussing LR-H-182; Direct Testimony of Sharon Daniel, USPS-T-29, at 7, 8, 11 and Exhibits USPS-29A, B, C and D, citing LR-H-106 and 109; and Direct Testimony of Charles L. Crum, USPS-T-28, at 10-12, citing LR-H-108. Moreover, three of these library references were identified at the outset as having been prepared by Christensen Associates, witness McGrane's employer. See USPS-T-36 at 25 and the cover pages to LR-H-108 and 109.

Not so many cases ago, parties and the Commission faced the opposite problem -- an initial Postal Service filing with comparatively few supporting library references that omitted underlying supporting data and analyses. Parties and the Commission spent much of the discovery period seeking to obtain underlying supporting documents, many of which did not become available until the late stages of discovery, often after extensive motion practice and orders to compel. Here, on day one, the Postal Service has provided that information as library references, specifically cited in witnesses' testimony, and made available immediately to the parties for perusal and discovery. The mass and complexity of this information creates its own set of problems -- but problems that are distinctly different from the past problems of not even having access to supporting information until late in the case.

This proceeding is complex. But that is because of the increasingly technical nature of rate proceedings generally. Over the years, parties and the Commission (often at the behest of parties) have sought increasingly more refined and detailed information on postal costs. These costs are now broken down into finer categories according to presort, entry, weight, shape, and automation characteristics. The advent of mechanization and now automation has further complicated the costing process. This complexity has also been compounded by changes in rate structure and classification, including the effects of the MC95-1 reclassification case. Every case adds a new layer of complexity.

This complexity cannot be blamed on library references. Had these library references initially been filed as additional pieces of testimony sponsored by witnesses -- e.g., USPS-T-44 through USPS-T-99 -- the complexity would have been unchanged, except for the elimination of motion practice related to sponsorship. Even then, resourceful counsel might still have found some bit of third-or fourth-level supporting information or analysis in an unsponsored library reference. What distinguishes these challenged library references is that they were specifically cited in USPS testimony as providing direct support for the witnesses' conclusions -- thus

putting all parties on notice of their relevance to the Postal Service's case. The witnesses' direct "roadmaps" from the testimony to these supporting library references acted, if anything, to mitigate complexity by directing the parties' attention to them at the outset.

We agree that the Postal Service's decision to initially provide supporting materials in the form of library references rather than sponsored testimony is not in every instance ideal. Absent a sponsoring witness, they would not be admissible as evidence under Special Rule 5. But now that sponsoring witnesses are offered, the only remaining question with respect to these relevant and material documents is whether the parties have nevertheless been deprived of an adequate opportunity for discovery and cross-examination, and if so, how that can best be cured.

As discussed below, the complaining parties have not been deprived of their due process rights, and will have the opportunity to confront sponsoring witnesses and present rebuttal testimony if they choose.

A. NDMS's Claim That Library References Are Inadmissible "Unless Sponsored By Witnesses As Of The Commencement Of The Proceeding" Misconstrues The Commission's Rules.

NDMS argues that these library references "*could not possibly be admissible as evidence in this proceeding, because they are unsponsored library references.*" NDMS Motion at 6 (emphasis in original). It reaches this conclusion by misreading Special Rule 5 (Presiding Officer's Ruling R97-1/4) as establishing a mandatory prohibition on subsequent admissibility of any library references that were "not sponsored by witnesses *as of the commencement of this proceeding.*" *Id.* (emphasis added). Yet Special Rule 5, on its face, clearly contemplates that initially-unsponsored library references may become admissible as evidence if subsequently designated and sponsored by a witness. "Library material is not evidence *unless and until* it is designated and sponsored by a witness." Special Rule 5 (emphasis added). NDMS's argument is now beside the point, as the Postal Service has designated the library references and is providing sponsoring witnesses.

NDMS's argument that admissibility is predetermined by the sponsorship status of a document at the time of filing is plainly wrong. Admissibility of any document, even written testimony, is not determined as of the date the document is filed, but at the time it is offered into evidence at the hearing. To be admitted into evidence, both written testimony and library references must be sponsored by a witness at the hearing, subject to cross-examination. This is precisely what the Postal Service is doing with respect to these library references.

NDMS similarly misreads Section 31(b) of the Commission's rules of practice as precluding evidentiary status of library references that were not sponsored as of the start of the case. Rule 31(b) states, in pertinent part, that

Designation of a document as a library reference . . . does not, *by itself*, confer any particular evidentiary status upon the document. The evidentiary status of the document is governed by this *section*.
(emphasis added).

Although designation "by itself" does not confer evidentiary status, the other provisions of Rule 31 governing admissibility, as well as Special Rule 5, make clear that subsequent provision of a sponsoring witness may confer evidentiary status. Rule 31(a) states that in any public hearing before the Commission, "relevant and material evidence which is not unduly repetitious or cumulative shall be admissible," and that "[w]itnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding of any questions are put to them." The Postal Service's offering of sponsoring witnesses for these library references satisfies those admissibility requirements.

B. The Parties Have Had Full Opportunity To Exercise Their Due Process Rights With Respect To These Library References.

Noticeably absent from NAA's motion is any claim that providing a sponsoring witness to withstand cross-examination on these library references would violate NAA's due process rights. That omission is understandable. The offering of a sponsoring witness actually protects NAA's due process rights.

NAA argues that “unsponsored” library references “are not evidence under the Commission’s rules.” NAA Motion at 1-2. However, the support it cites -- Special Rule 5 -- states that library reference material “is not evidence *unless and until* it is designated and sponsored by a witness” (emphasis added). The Postal Service’s designation of these library references and provision of sponsoring witnesses moots NAA argument.

From this false premise, NAA then leaps to the conclusion that “the Commission may [not] rely upon them consistent with due process,” citing *Mail Order Association of America v. USPS [MOAA]*, 2 F.3d 408 (D.C. Cir. 1993). NAA Motion at 2. *MOAA*, however, stands for the opposite point. There, the due process defect was the Commission’s reliance in its decision on a new methodology that had *not* been presented on the record and had *not* been subject to discovery, or cross-examination of a sponsoring witness, or opportunity to present rebuttal testimony. The parties never even saw the new methodology until the Commission’s decision was issued.

Here, by contrast, the library references were cited in the Postal Service’s initial testimony and have been available to the parties for perusal and discovery since the first day of this proceeding. NAA itself has engaged in extensive discovery with respect to these library references. *See, e.g.*, Postal Service responses to NAA interrogatories NAA/USPS-T36-17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, and 31 initially directed to witness Moeller and re-directed to the Postal Service, and NAA interrogatories NAA/USPS-18 and 19 directed to the Postal Service. NAA will now have an opportunity to engage in on-the-record cross-examination of a sponsoring witness both with respect to the library references themselves and to responses to interrogatories relating to the library references.² Furthermore, it will have the opportunity to file testimony in its direct case rebutting the analyses in these library

² By its Notice of October 8, 1997, the Postal Service has stated that witness McGrane will adopt and sponsor these and other institutional responses relating to the library references. Notice of the USPS Concerning Filing of Supplemental Testimony of Michael R. McGrane (USPS-ST-44), at 1.

references, if it so chooses. In sum, NAA and the other parties have had, and will continue to have, full opportunity to exercise their due process rights.

NDMS tries the opposite tack, claiming that it has had “no opportunity to propound written discovery” with respect to supplemental testimony sponsoring the library references, and thus has been “den[ied] an adequate period of time to investigate and discover the case.” NDMS Motion at 4 n. 1, 13, 14. Yet the library references being sponsored in the supplemental testimony have been available for discovery since the start of the case. Their relevance to the Postal Service’s case, as stated in the initial USPS testimony, has likewise been apparent from the start. Other parties, like NAA, have engaged in extensive discovery concerning these and other library references. While NDMS may have chosen to forego discovery in the hope that proposals it did not like could later be stricken for lack of “evidence,” it cannot plausibly claim that it had “no opportunity” to conduct such discovery.

C. The Library References Do Not Constitute A “Modification” To The Postal Service’s Case.

NDMS and others claim that allowing these library references into evidence would be tantamount to “allow[ing] the Postal Service to *modify* its initial evidentiary presentation in this case so as to effectively deprive the intervenors of meaningful discovery and cross-examination.” NDMS Motion at 10 (emphasis added). Similarly, NAA argues that “these materials were not properly filed as part of the Postal Service’s direct case.” NAA Motion at 3. These library references, however, do not in any sense constitute a substantive “modification” of the Postal Service’s case. As noted above, they were filed with the Postal Service’s initial request and testimony, and were specifically cited and identified by USPS witnesses as support for specific aspects of their testimony.

The second part of NDMS’s claim -- that intervenors have been “effectively deprived ... of meaningful discovery and cross-examination” -- is likewise exaggerated. As discussed above, NDMS has had the entire discovery period to

conduct discovery with respect to these library references. The sponsorship and incorporation of these library references in the form of supplemental testimony does not constitute any fundamental change in the substance of the library references, but merely affords the parties an opportunity to conduct cross-examination of a sponsoring witness.

In the case of witness McGrane's USPS-ST-44, the supplemental testimony is simply a formalistic adoption of LR-H-182 by a sponsoring witness. In some other cases, supplemental testimony incorporates errata to the original library references, a circumstance that NDMS claims further prejudices its opportunity to conduct meaningful discovery and cross-examination. NDMS Motion at 12, 4 n. 1. Yet ironically, most of these errata were the result of errors detected through questions raised by the parties *in the discovery process*. Rather than suggesting inadequacy of discovery, these errata actually demonstrate that the parties have, indeed, had a meaningful and productive opportunity to conduct discovery with respect to these library references.³

The movants' arguments thus come down to the technical claim that the library references -- even though filed with and specifically referenced in the Postal Service's direct testimony -- were not "properly" filed as "part of" the Postal Service's direct case. Admittedly, this claim could have been avoided had the Postal Service initially captioned these documents as "Testimony of Witness ____ on Behalf of the United States Postal Service" and attached the designation "USPS-T-__" instead of "LR-H-__" at the top of the cover page. But that omission has not prejudiced any party.

³ NAA's attempt to distinguish LR-H-109 and 182 from other library references is groundless. Its distinction between library references that contain "factual data" or "routine Postal Service data" and those that contain analyses in support of USPS proposals (NAA Motion at 3, 4) ignores that *all* of the library references USPS witnesses are now sponsoring include or rely upon "routine" or "factual" data to some extent; yet *none* consists purely of such data. Each includes analyses based on that data in support of USPS proposals. LR-H-182, for example, relies to a great extent on volume data and IOCS and LIOCATT cost data by ounce increment that are routinely collected, and then uses those data to develop costs by ounce increment. This kind of analysis of underlying factual data is characteristic of all the library references, and is not a ground for distinguishing those cited by NAA from the others.

D. ANM's Requested Remedy -- A Stay Of The Proceeding Pending A Refiling Of The Case -- Is Unwarranted.

ANM's motion to stay the proceedings raises arguments about library references in general and the complexity of this case, but does not focus specifically on the library references addressed here. With respect to LR-H-106, 108, 109, and 182, its general arguments are adequately answered above.

ANM's remaining arguments are inapplicable to these particular library references. They were not "buried" under "boxcars of irrelevant matter" (ANM Motion at 5, 12-13), but were clearly identified and referenced in the testimony of USPS witnesses. Nor is there any question of missing workpapers (*id.* at 9-12). Moreover, much of ANM's motion focuses on deficiencies or errors in data that were uncovered through discovery, a circumstance that confirms the effectiveness of the parties' discovery opportunity.⁴

More broadly, ANM's insistence that the Postal Service's initial filing should include sponsoring witnesses for every bit of data that might be linked to its case (*id.* at 7-8) is unworkable. Even if the library references at issue here had been presented initially as sponsored testimony, someone could always find some bit of Postal Service's case that might be linked to some unsponsored library reference -- still giving rise to motions to strike testimony or to stay the proceeding pending refiling of a "complete" case. The only way for the Postal Service to mitigate this possibility would be to file mountains of material, including most library references, as sponsored testimony -- an approach that would make the proceedings even more complex.

The remedy ANM seeks, stay of the proceeding pending the Postal Service's refiling of a new rate case, is clearly unwarranted. The movants have had an

⁴ ANM's complaint about "incorrect" figures in LR-H-108 (*id.* at 11 n. 5) is a good example of the overbreadth of its arguments. The error it cites (Tr. 2223-24) amounts to \$7 out of \$1,692,478 total costs for letters, and \$6 out of \$1,417,875 total costs for flats -- nearly infinitesimal discrepancies of well less than one one-thousandth of 1 percent that have no effect whatsoever on ratemaking cost analysis, much less on final rates.

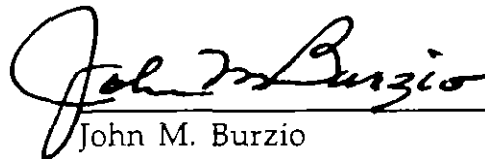
adequate opportunity to conduct discovery with respect to these library references, and will have their due process opportunity to confront sponsoring witnesses and present rebuttal.

CONCLUSION

For the above reasons, there is no basis to exclude from evidence the materials in LR-H-106, 108, 109, and 182, now sponsored through the supplemental testimony of witnesses Smith, Crum, and McGrane, or to strike the related testimony of witnesses Crum, Daniel, or Moeller. These documents are relevant and material to the Postal Service's proposals and to the issues in this case, and the movants have not shown that receipt of these long-available materials through sponsoring witnesses would infringe on their due process rights. The movants' motions to exclude or strike these materials and related testimony should be denied.

If, however, the Commission were to find a serious due process question, the appropriate remedy should be to allow an additional period for parties to prepare for cross-examination of the sponsoring USPS witnesses, rather than to exclude relevant and material evidence from the record.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.


Thomas W. McLaughlin

October 24, 1997